Supreme Court, U.S.
FILED
931560 APR - 4 1994
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MAURICE R. HUFF
NANCY R. HUFF,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEAL

PETITON FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DOES §6103(k)(6) OF THE INTERNAL REVENUE CODE PROVIDE A DEFENSE TO AN ACTION FOR UNAUTHORIZED DISCLOSURE OF TAX INFORMATION WHEN THE DISCLOSURES ARE FROM ILLEGAL/ UNAUTHORIZED LEVY NOTICES?

2. IS AN IRS 'CERTIFICATE OF ASSESSMENTS AND PAYMENTS' ADMISSIBLE IN EVIDENCE, OVER OBJECTION, AND PROOF OF A PROCEDURALLY VALID ASSESSMENT, OR PROOF OF THE MAILING OF NOTICES?

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OPINIONS BELOW

The opinion of the appellate court is published at 10 F.3d 1440, and is reprinted in the appendix (p. 16). The order and opinion of the district court is reprinted in the appendix (p. 30). The order of the appeal court on rehearing is not published, and is reprinted in the appendix (p. 37).

JURISDICTIONAL GROUNDS

Petitioners, Maurice and Nancy Huff, in proper person, respectfully petition this Court for a Writ of Certiorari to review the judgement rendered in this case by the Ninth Circuit Court of Appeals. The opinion was entered on November 26, 1993. Petition for rehearing was denied January 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are as follows:
26 U.S.C. 6103(a). Confidentiality and Disclosure of Returns and Return Information.

Returns and return information shall be confidential, and except as authorized by this title---

(1) No officer or employee of the United States, shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

26 U.S.C. 6103(k)(6). Disclosure by internal revenue officers and employees for investigative purposes.

An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws disclose return information to the extent that such disclosure is necessary in obtaining

information, which is not otherwise reasonably available, with respect to the correct determination of tax liability, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

26 U.S.C. 7431(a). Civil damages for unauthorized disclosure of return or return information.

(a) In General

(1) If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

Evidence Rule 1004. Admissibility of Other Evidence of Contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Evidence Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

STATEMENT OF THE CASE

Beginning in March 1987 the Internal Revenue Service (IRS) began issuing various notices of federal tax lien and notices of levy claiming petitioners owed over $25,000 for income taxes for the period 1982. Prior to the issuance of these notices, Huffs had never received notice of assessment and demand for payment from the IRS, as required under Internal Revenue Code (IRC) §6303(a). In April 1987 the IRS filed lien notices in Shasta County California against petitioners in the amount of $10,678.78 each. In June 1987 the IRS issued a levy notice to Maurice Huff's employer arbitrarily claiming some $11,153.94 was owed for 1982. A week later, it issued a release of that notice, although nothing had been collected.

In an effort to satisfy the IRS' arbitrary claims and stop the collection activity, Huffs entered into an oral agreement with the IRS and made payments from July 1987 to March 1988 of $100 per month for the alleged taxes it claimed were due for 1982. Nonetheless, in September 1987 the IRS issued another notice of levy to Maurice Huff's employer, this time claiming $11,453.30 was owed. A release notice was issued two weeks later, again with nothing collected.

In November 1988 Huffs sought a home loan, but were told the tax lien claims would have to be paid in order to obtain any such loan. Having been hounded by the IRS for nearly two years, Huffs agreed to the loan terms. On January 4, 1989 a payment of $25,285.51 was made to the agency as a result of

the loan Huffs had secured. The payment was for the purpose of paying in full the IRS' claim for 1982.

In March and February of 1990 the IRS issued two more levy notices to Maurice Huff's employer. Each was followed by a release notice within a few days with nothing collected. In August of 1990 the IRS issued still another levy notice to Nancy Huff's employer, still claiming amounts owing for 1982. This too was followed by a release notice, with nothing collected. Having gotten fed up with the IRS' arbitrary actions and disclosures, Huffs requested a copy of their record of assessment for 1982 pursuant to IRC §6203. When the IRS failed to produce any record resembling what the regulations required, Huffs filed a complaint in federal district court to quiet title (under 28 U.S.C. §2410(a)) against the apparently still outstanding claims of the IRS, and for return of the monies already paid. Huffs also alleged claims for unauthorized disclosure under 26 U.S.C. §7431 with regard to the levy notices.

In support of their cause to quiet title, Huffs alleged the IRS had failed to comply with the prerequisites for establishing an actual lien and for making any levies. The complaint alleged (i) a failure to issue any deficiency notice to Huffs, as required under IRC §6212; (ii) failure of the IRS to make any assessment against Huffs under 26 CFR §301.6203-1; and (iii) failure to issue Huffs any notice of assessment and demand for payment, as required under IRC §6303(a). These allegations were also the basis for Huff's claim for return of the monies already paid, and for the unauthorized disclosure claims.

The district court granted summary judgement against Huffs on all claims. It held that the IRS' lack of compliance with any notice of deficiency and/or assessment requirements of the IRC were irrelevant for purposes of a quiet title claim, although failure to comply with the notice of assessment requirement was cognizable in such an action. Based on documents the IRS manufactured on July 24, 1991 and October 15, 1991,

called "Certificates of Assessments and Payments" (also known as Forms 4340), the district court found a presumption that assessment notices had been issued as required under IRC §6303(a).

These 'Certificates' consisted merely of columns and rows where dates were entered across from an alleged activity. The alleged activity was characterized in a conclusory single word such as "assessment", or "notice". No signature of any assessment officer appeared anywhere on these documents, and there was no evidence of any actual mailing of any 'notices', nor even any amount associated with any of the 'notice' entries. Huff's motion to strike the 'Certificates' as inadmissible was denied, and their declaration of non-receipt of any notices was held immaterial.

On appeal, the Ninth Circuit set the case for oral argument and, because the record was unclear, the panel ordered the government to file a supplemental brief on the issue of what it claimed petitioners still owed for the years 1982-1985. The supplemental brief admitted that Maurice Huff owed nothing, but claimed that Nancy Huff still owed $2,789.93 for 1982. No explanation was given as to why the prior levy notices were issued against Maurice Huff when he admittedly owed nothing.

The appellate court affirmed the district court's ruling that the issuance of deficiency notices was irrelevant for purposes of a quiet title suit under 28 U.S.C. §2410(a). However, it reversed the ruling that a failure to make an assessment was irrelevant. It then proceeded to inquire into whether or not there was evidence to show the IRS had complied with the assessment procedures, and with the notice and demand requirements under 26 CFR §301.6203-1, and IRC §6303(a), respectively.

Although the court acknowledged that an assessment is made by execution of IRS Form 23C, it nonetheless ruled that the mere entry of a "23C date" on the IRS' "Certificates" provided 'presumptive' evidence that a tax has been validly assessed. However, it found that the "Certificates" relating to Maurice

Huff contained no "23C date". The court cited absolutely no reason why the government should not be required to produce primary evidence, i.e. the actual assessment records (23C forms), and the government gave no excuse whatever for not doing so.

The court also held that the mere entry of a date, along with the phrase "notice" or "notice of balance due", on the "Certificates" was sufficient to prove the IRS mailed or delivered the notices of assessment as required by IRC §6303(a). The entries referred to no amount whatsoever, nor showed any evidence of mailing or delivery. The court tentatively reversed the district court on this issue with respect to Maurice Huff because it could not determine whether the notice(s) had been issued within 60 days of any assessment made against him due to lack of a "23C date" on the IRS' "Certificates". However, it allowed reinstatement of the judgement if the district court found a valid assessment within 60 days prior to the alleged notice date.

With respect to Huffs' actions for unauthorized disclosure, the court held that, regardless of the illegality of the lien and levy notices, they fell within the exemption from non-disclosure under IRC §6103(k)(6).

REASONS FOR GRANTING PETITION

This case presents the issue of whether Congress has made an exception to the general anti-disclosure provision of the Internal Revenue Code which would allow the IRS to issue unauthorized/illegal levy notices, yet still have them considered to be 'authorized disclosures' under IRC §6103. It also presents the issue of whether the IRS is bound by the same rules of evidence as everyone else, or whether there is some exception which allows courts to admit mere summary records the IRS has made up strictly for litigation when there is no foundation laid for any such summaries, no disclosure of the records which underlie the summary, and no exception shown for allowing

secondary records.

A. Conflicts Regarding Evidence.

The appellate court held that the government's summary record "Certificates of Assessments and Payments" were "proof" of assessments and of notices being issued. Although these "Certificates" did not even exist until July 24, 1991 for Nancy Huff, and October 15, 1991 for Maurice Huff, they alleged to pertain to activities dating *years* back.

Although the appellate court clearly recognized in its opinion that the IRS' "Certificates" are merely secondary records (and just summaries at that), it failed to give any explanation why the actual assessment records should not be produced, as required under Evidence Rule 1004, and how the records underlying these summary "Certificates" were produced for Huff's inspection, as required under Evidence Rule 1006. It acknowledged that an assessment is made by an assessment officer signing a 'summary record of assessment', also known as a Form 23C. However, instead of requiring the government to produce the actual assessment forms, the court merely looked to a "23C date" the government listed on the "Certificates" the IRS had manufactured. It then held these dates "provide at least presumptive evidence that a tax has been validly assessed".

The court also held that these same "Certificates" proved that the notices of assessment and demand for payment had been issued as required under 26 U.S.C. §6303(a). [Appen. p. 27] This statute requires (i) notice of an assessment be made within 60 days, (ii) the notice be either personally delivered, or mailed to the taxpayer's last known address, and (iii) demand of a specific amount. The government's "Certificates" did not even attempt to show any method of delivery of the notices alleged, nor any amount allegedly demanded. Nonetheless, the appellate court held the "Certificates" were sufficient proof of issuance of the notices. Earlier the same year however, the same circuit ruled that these same "certificates" were inconclusive on the

issue of notices being issued, especially when one declares not to have received said notice(s). *Farr v. United States, et al.*, 990 F.2d 451, 454 (9th Cir. 1993). Just like in *Farr*, Huffs had submitted a declaration of non-receipt of any notice(s) of assessment.[1] For some unknown reason however, the appellate court failed to apply the same rule it did in *Farr*.[2] Thus, there are now conflicting published decisions within the circuit, a situation which will no doubt cause confusion in the lower courts.

Up until recently it was not known just how the IRS' "Certificates" came into existence. There is no internal revenue statute or regulation which even mentions them, nor does it appear they are the result of any duty of law, or any type of report made as a result of compliance with any law. It was finally unearthed in the Fifth Circuit case of *United States v. Buford*, 889 F.2d 1406 (5th Cir. 1989) that the "Certificates" are the result of translations of codes from an IMF computer record.[3] It was discovered in that case that the "Certificates"

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[1] The district court ruled that Huffs' non-receipt was immaterial. This decision, however, was made prior to the opinion in *Farr*.

[2] The court's opinion in this case creates confusion over what was stated in *Farr*. There was no issue in *Farr* regarding a failure to supply a copy of the record of assessment under IRC §6203. Rather, the dispute there was over the notice of assessment required under §6303(a), the notice required to establish a lien, as set forth under IRC §6321.

[3] An "Individual Master File" (IMF) consists of pages of coded information on individuals. It is maintained on a computer in the Martinsburg Computer Center (MCC), which is located in Martinsburg, West Virginia. The information on

were hand prepared using information taken from the IMF, and that the "Certificates" "had been prepared specifically for trial." *Buford* 889 F.2d at 1408.

The Fifth Circuit reversed Buford's conviction because it found "no authority for the district court's action" of allowing "Certificates" to be utilized, over objection, "without the underlying official record" (citing F. R. Evid. 1004). *Id.* Moreover, it found specific error because there were indications from other records which showed the IMF did not support the contentions made in the "Certificates", i.e. a failure to file a return.[4]

Buford's case is not alone in finding the government's "Certificates" to be erroneous. *United States v. Berman*, 825 F.2d 1053 (6th Cir. 1987) (computer transcript found to be incorrect with no explanation); *Blackston v. United States*, 778 F.Supp. 244 (1991) ("Certificates" found to be inconsistent, government refused to offer any explanation, even in face of rejection by court). Other courts have also held that an assessment is only valid when signed by an assessment officer, and cannot be proven by mere authentication of a certificate. *Brafman v. United States*, 384 F.2d 863, 865-66 (5th Cir 1967).

Thus, while the Ninth Circuit holds that, without question, the government's "Certificates" are "proof", in and of themselves, of whatever is entered on them (except for the

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the IMF must be "decoded" to be comprehensible. See *United States v. Buford*, 889 F.2d 1406, 1407-8 (5th Cir. 1989).

[4] Indeed, in Buford's second trial, the government mysteriously was able to produce the return which was alleged in the "Certificates" to have not been filed. See unpublished opinion in Buford's second appeal, *U.S. v. Buford*, 91-1447 (May 6, 1992), p. 3.

issuance of notices),[5] other courts have held them to be secondary evidence, and/or found them to be erroneous altogether. This conflict should be resolved, particularly in view of the fact that there is absolutely no statute or regulation which even recognizes these "Certificates", and nothing which controls their content or accuracy.[6] Yet, the government appears to use them consistently in both civil and criminal litigation in order to prove some part of its case. The *Buford* case shows the danger of allowing such a practice to continue. When people can be convicted through the government's use of fabricated information and records, petitioners submit this Court's attention is warranted, if not required.

Petitioners believe this Court's ruling in *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477 (1943) would govern the evidentiary issue presented here. In that case, a railroad accident report was held inadmissible as a business record, even though it was required to be made by regulations. This Court held such a record was "not a record made for the systematic conduct of the business as a business." 318 U.S. at 113. Consequently, it was held inadmissible. The case is no different here. The IRS does not use any "Certificates of Assessments and Payments" in the regular course of its activities. It uses them exclusively for litigation. Further,

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[5] As stated already, in *Farr v. United States*, 990 F.2d 451, at 454 (1993), the Ninth Circuit held that the IRS' "Certificates" are not conclusive evidence for proving the issuance of notices. Why the same standard was not applied to Huffs is unknown.

[6] It would appear from the *Buford*, *Blackston*, and *Berman* cases that the government's "Certificates" are highly unreliable, and if it is allowed to continue this practice, an opposing party should be allowed ample discovery of the records underlying the "Certificates", in accordance with Rules 1004 and 1006.

unlike *Palmer*, the IRS' "Certificates" do not even come into existence as the result of complying with any regulation. They are made solely for "evidence" in a court case, and do not even exist until then. Therefore, petitioners contend the Ninth Circuit, as well as others, are simply ignoring a prior ruling of this Court on the admissibility of evidence, and sanctioning a practice this Court has previously condemned. Consequently, the appellate court's ruling on the admissibility, and/or probative value, of the IRS' "Certificates" should be reversed and the case remanded for a new opinion.

B. Conflicting Decisions Among The Circuits Regarding Unauthorized Disclosures.

Part of Huff's suit against the United States was regarding the disclosures of tax information made by the IRS via its lien and levy notices. Huffs contended these notices violated the anti-disclosure provisions of 26 U.S.C. 6103(a) because the collection action was *illegal*.

Congress did not give the IRS unbridled authority for its extraordinary collection powers, but made the use of such power conditional, and set forth the conditions in §6331(a) as to when a levy would be "lawful". One of those conditions is the issuance of a prior notice and demand for payment, as required under 26 U.S.C. §6303(a). Such notice is also required in order to establish a tax lien. 26 U.S.C. §6321. Huff's complaint alleged no such prior notice had been made. Consequently, no lien actually existed, and no levy was authorized. Therefore any disclosures in the form of notices of lien or levy were illegal, and violated §6103(a). If the disclosures did violate the statute, the United States would be liable for damages to Huffs under 26 U.S.C. 7431.

In upholding the judgement on these causes of action, the appellate court held Huffs could not bring an action for unauthorized disclosure "even though the collection procedures may have been defective" [Appendix p. 28]. It summarily ruled

that the information disclosed in the illegal lien/levy notices fit "squarely within the exemption under section 6103(k)(6)." It made this ruling even though the government had admitted that Maurice Huff owed nothing for the periods involved. From this ruling, it appears the IRS is allowed to disclose tax information through the issuance of illegal and arbitrary lien and levy notices, disrupt the lives of Americans through these illegal disclosures, and no action can be brought against the IRS for the damage caused. This is hardly what congress could have intended by the anti-disclosure exception set forth in §6103(k)(6), and the 9th Circuit's decisions on this matter are in direct conflict with other circuits.

In *Rorex v. Traynor*, 771 F.2d 383 (8th Cir. 1983) it was squarely held that disclosures of tax information made in pursuit of unauthorized (illegal) levies violate the general anti-disclosure provisions of 26 U.S.C. 6103(a), and 6103(k)(6) is no exception allowing for disclosures in the form of illegal levies. Also see *James v. United States*, 970 F.2d 750, 757 n. 13 (10th Cir. 1992) (if district court finds IRS lack of compliance with pre-levy procedure, it should address claim under §7431. However, nearly the opposite was held in *Weiner v. IRS*, 986 F.2d 12 (2d Cir. 1993) (illegal/erroneous levy notices not actionable under §7431 since "computer error" by IRS employees which caused issuance of notices does not amount to negligence).

Additionally, other circuits have taken a fundamentally different view of §6103(k)(6) and ruled it only applies to disclosures "necessary" in *obtaining* information. *Rodgers v. Hyatt*, 697 F.2d 899, 904 (10th Cir. 1983) (6103(k)(6) only authorizes disclosures to the extent necessary *in obtaining information*); *Chandler v. United States*, 887 F.2d 1397 (10th Cir. 1988) (affirming district court opinion which followed *Rodgers*); *Barrett v. United States*, 795 F.2d 446, 449-50 (5th Cir., 1986) (6103(k)(6) only authorizes disclosures necessary to *obtain* information and where information sought is not

otherwise reasonably available). Obviously, the disclosures made via lien and levy notices (legal or illegal) would hardly be for the purpose of *obtaining* information. As can be seen, these decisions are fundamentally divergent on the construction and application of the §6103(k)(6) exception to the general rule of non-disclosure.

In view of this Court's opinion in *Church of Scientology of California v. IRS*, 484 U.S. 9 (1987), it has apparently considered the anti-disclosure provision of the Internal Revenue Code (§6103(a)) to be quite important. The Court recognized in that case that §6103(a) "lays down a general rule that 'returns' and 'return information' shall be confidential," and prohibits their disclosure *except as authorized by the code*. *Id.* at 10, 11-12. The Court further quoted a Senate Report which stated that 'returns' and 'return information' are "'not subject to disclosure except in those limited situations delineated in the newly amended section 6103.'" *Id.* at 16.

From the above decisions of the appellate courts, there is a clear conflict as to the fundamental application of §6103(k)(6), and as to whether it allows for disclosures made in the form of unauthorized/ illegal lien and levy notices. This conflict should be resolved. Petitioners contend that Congress could not have intended an exception to §6103(a) which allows disclosures to be made in pursuit of illegal collections, or other disclosures not specifically authorized by the code. Since the IRS deals with nearly everyone in the public at large, and has such extraordinary power with virtually no way of redressing abuses, the general public has an ongoing interest in the resolution of this issue. Therefore, this conflict among the circuits should be resolved by this Court.

CONCLUSION

The public perception today is that the IRS is above the law and can do anything it wants. Many perceive it as a rogue agency which is out of control with nothing that can be done to stop activities which violate even its own procedures.

One of the issues before this Court is whether or not the IRS can make disclosures of tax information through the form of unauthorized/illegal lien and levy notices, and yet still have those disclosures considered "authorized" under revenue code §6103. Some appellate courts have held such disclosures are "authorized" under §6103(k)(6), while others have held just the opposite. There can be no doubt that the IRS itself questioned the validity of its levy notices in this case since it issued releases within days, and never collected a dime from any of them. Thus, the only thing accomplished was the disclosure of Huffs' tax information to third parties. Moreover, the IRS admitted in its supplemental appeal brief that Maurice Huff owed nothing when most of the levy notices were issued. Nonetheless, the appellate court agreed with the lower court that 'the information was properly disclosed in connection with the IRS' collection activities.' It is apparent from this case that the 9th Circuit has sanctioned disclosures of tax information, via the issuance of levy notices, even when the individual owes nothing, and, therefore the information disclosed is false. Congress could not have possibly intended for this absurdity in §6103(k)(6). Therefore, the appellate court should be reversed on this issue.

The other issue before this Court is whether or not the IRS is subject to the same rules of evidence as everyone else. Anyone else who made up records just for litigation would not be allowed to enter them in evidence over objection. Not so for the IRS. Anyone else would be required to produce primary records for evidence, or show some exception for allowing secondary records. Not IRS. In addition, the IRS' "Certificates" are nothing but summaries. Anyone else would be required to produce the records underlying the summary, as required under Evidence Rule 1006. Not the IRS. Thus, the 9th Circuit, as well as some other appellate courts, are undoubtedly carving out exceptions to the rules of evidence *just for tax cases* by their rulings on the admissibility and probative

value of the IRS' made-for-litigation "Certificates". Petitioners have found no similar evidentiary rulings, outside of tax cases, where records of this type were merely accepted at face value, without any foundational requirement whatsoever, and then considered to create a presumption that some activity occurred.

It goes without saying that when a court will blindly accept as evidence one party's mere contentions contained in a summary record (which was made just for litigation) and not require anything more, the result of such a case is a foregone conclusion. Moreover, in view of this Court's decision in *Palmer v. Hoffman*, supra, it appears the 9th Circuit is simply ignoring what this Court has already said. Petitioners believe this state of affairs calls for this Court's attention. Therefore, certiorari should be granted.

DATE: March 28, 1993.

Submitted by,

Maurice R. Huff
Nancy R. Huff

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAURICE R. HUFF, NANCY HUFF,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 92-15089

D.C. No.
CV-91-00859-WBS

OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued, Submission Deferred June 18, 1993
Resubmitted August 19, 1993
San Francisco, California

Filed November 26, 1993

Before: Thomas E. Fairchild*, Robert R. Beezer and
Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Tax/Tax Liens

The court of appeals affirmed in part and reversed in part a district court judgment. The court held that taxpayers' contention that they requested and never received a copy of an

*Hon. Thomas E. Fairchild, Senior United States Circuit Judge for the 7th Circuit Court of Appeals, sitting by designation.

assessment raises issues of fact regarding the validity of the assessment.

The Internal Revenue Service (IRS) issued numerous Notices of Intention to Levy and Notices of Federal Tax Lien to appellants Maurice and Nancy Huff and their employers before seizing the Huffs' home for past due taxes. The Huffs requested copies of their records of assessment. In response, they claimed to have only received a document which did not contain the information required under applicable regulations.

The Huffs sued the government under 28 U.S.C. § 2410, challenging the procedural validity of the tax liens. Among other things, the Huffs alleged that the government failed to assess the Huffs in accordance with 26 U.S.C. § 6203, by failing to properly assess taxes against them and respond to their request for a copy of an assessment. The government introduced IRS Forms 4340 as evidence that a tax had been validly assessed. The district court granted summary judgment for the government. The Huffs appealed.

[1] The Ninth Circuit has held that claims regarding the IRS's failure properly to assess a tax and to provide a taxpayer with a copy of an assessment under § 6203 present procedural challenges to the validity of a lien and are therefore cognizable under § 2410.

[2] Generally, courts have held that IRS Form 4340 provides at least presumptive evidence that a tax has been validly assessed under § 6203. But, in this case, the IRS sought to rely on these forms also to prove that the taxpayers had been provided with a copy of the assessment. No entry on the form contained any information in that regard.

[3] Moreover, Forms 4340 are not conclusive evidence that the IRS complied with § 6203. The record was devoid of any indication that the Huffs were provided with copies of the forms in response to their request for a copy of their assess-

ments. [4] In addition, some of the Forms 4340 provided by the government appeared defective. [5] Thus, there were genuine issues of material fact as to whether the IRS had complied with the requirements of § 6203.

COUNSEL

Maurice Huff and Nancy Huff, Pro per, Redding, California, for the plaintiffs-appellants.

Gary R. Allen and Kenneth L. Green, and David Pincus, Tax Division, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

OVERVIEW

The Huffs, pro se plaintiffs, filed a seven count complaint against the IRS. Counts I-III are best characterized as challenges to the procedural validity of tax liens under 28 U.S.C. § 2410. Count IV most resembles a request for a refund pursuant to 28 U.S.C. § 1346(a)(1). Counts V-VII seek damages for unauthorized disclosures of tax return information under 26 U.S.C. §§ 6103 and 7431(a). The district court granted summary judgment in favor of the IRS on all counts. We affirm in part and reverse in part.

FACTS

In March, 1987, the IRS issued a Notice of Intention to Levy to Nancy Huff, claiming that she owed $25,904.53.[1]

[1]All "deficiency" amounts refer to the 1982 tax year, unless otherwise indicated.

About a month later, the IRS filed a Notice of Federal Tax Lien against Mrs. Huff in Shasta County, California, stating that she owed $10,678.78. In addition, the IRS posted a warning notice on the Huffs' home, which indicated that the property had been seized for "non-payment of taxes." Roughly a week later, the IRS filed a Notice of Federal Tax Lien against Maurice Huff, which stated that he also owed $10,678.78. On the same date, Mr. Huff received a Notice of Intention to Levy, indicating that he owed $11,070.17. About two weeks later, the Huffs each received a Levy Notice and Notice of Seizure indicating that their home had been seized for past due taxes. The Huffs allege that prior to the events outlined above they received no notice of deficiency and that none was sent, and that they received no notice of assessment and demand for payment and that none was sent.

In June, 1987, Mr. Huff's employer received a Notice of Levy, stating that Mr. Huff owed $11,153.94. Immediately, Mr. Huff asked for and received a leave of absence from his job that lasted about a month. A week later the IRS issued a Release of Levy Notice to Mr. Huff's employer.

Plaintiffs allege that they entered into an oral agreement with the IRS at this point, the terms of which are not disclosed in the record, and began making $100 a month payments. These payments began in July, 1987, and continued until March, 1988.[2] However, in September, 1987, Mr. Huff's employer received a Notice of Levy, indicating that Mr. Huff owed $11,453.30. Two weeks later, the IRS issued a Release of Levy Notice to Huff's employer.

In November, 1987, the Huffs sought a home improvement loan. During the application process, the Huffs were informed that they could not get a loan until the tax liens were paid off. In an effort to escape the burden of the tax lien and further

[2]The IRS contends and the Huffs do not dispute that no payment was made in January, 1988.

collection procedures, the Huffs arranged for the lender to pay off the tax lien with part of the money they received from the home improvement loan. Consequently, the Huffs' lender issued a check to the IRS for $25,285.51 in January, 1989.

Just over a year later, the IRS notified Mr. Huff that it intended to levy on his wages for a $904.03 deficiency in his 1984 and 1985 tax years. The next day the IRS issued a Release of Levy Notice. About a month later, the IRS sent a Notice of Levy to Mr. Huff's employer. A week later the IRS issued another Release of Levy Notice. In late August, 1990, the IRS issued a Notice of Levy to Mrs. Huff's employer, indicating that she owed $5,989.41 for the 1982 tax year. Two weeks later, the IRS sent Mrs. Huff's employer a Release of Levy Notice.

Eager to determine exactly what they owed the IRS, the Huffs requested copies of their records of assessment for the periods 1982-1986 in January, 1991. In response, they claim to have received an indecipherable document entitled "IMF MCC TRANSCRIPT—SPECIFIC," which did not contain the information required under 26 C.F.R. § 301.6203-1.

In June, 1991, the Huffs filed a complaint in federal district court. The complaint challenged the validity of the tax liens filed against the Huffs for deficiencies in the 1982 tax year, sought a refund of monies collected for the 1982 tax year, and stated three claims for unauthorized disclosure of return information. The district court granted summary judgment in favor of the IRS, and the Huffs appealed. On appeal, the Huffs renew the argument raised below that the attorney representing the United States was not authorized to do so. The record was unclear as to exactly what amounts, if any, the Huffs still owe the IRS. Accordingly, we ordered supplemental letter briefs on this issue, and the IRS has indicated that Mr. Huff owes nothing for the tax years 1982-1985 but that Mrs. Huff still owes $2,789.93 for the 1982 tax year.

STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. *FDIC v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992); *Jones v. Union Pacific R.R.*, 968 F.2d 937, 940 (9th Cir. 1992). We review the record in the light most favorable to the Huffs to determine whether there is a genuine issue of material fact and whether the district court applied the substantive law correctly. *O'Melveny & Meyers*, 969 F.2d at 747; *Jones*, 968 F.2d at 940.

DISCUSSION

A. Authority to Represent the United States

First, the Huffs challenge the authority of John P. Pirkle, a trial attorney in the tax division of the Department of Justice, to represent the United States in this matter. The Huffs argue that only a United States Attorney can represent the United States in this case. However, 28 U.S.C. § 516 provides that "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested ... is reserved to officers of the Department of Justice ...." *See also United States v. Plesinski*, 912 F.2d 1033, 1038 (9th Cir. 1990) (indicating that either the Department of Justice or United States Attorneys can represent the United States in litigation), *cert. denied*, 111 S. Ct. 1306 (1991). Moreover, § 517 states that "any officer of the Department of Justice ... may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States ...." 28 U.S.C. § 517 (1988). While the Huffs contend that an issue of fact exists as to whether Mr. Pirkle was "sent" by the Attorney General, nothing in the record supports this contention.

In addition, the regulations promulgated under § 517 refute the Huffs' argument. Pursuant to the statutory authority granted the Attorney General to "send" an employee of the

Department of Justice to attend to the interests of the United States, the Department of Justice, under the direction of the Attorney General, has promulgated regulations authorizing the tax division to represent the United States in various tax matters. *See* 28 C.F.R. § 0.70 (1992). Subsection (a) of § 0.70 indicates that the tax division conducts, handles, or supervises the "defense . . . of civil suits, and the handling of other matters, arising under the internal revenue laws, and litigation resulting from the taxing provisions of other Federal statutes . . . ." In addition to this broad grant of authority, the tax division is authorized to represent the United States in actions arising under 28 U.S.C. § 2410 "whenever the United States is named as a party to an action." *Id.* § 0.70(c)(2). Here, the Huffs brought an action under § 2410 and other provisions of the Internal Revenue Code. Therefore, Mr. Pirkle, as an attorney in the tax division of Department of Justice, is authorized to represent the United States in this matter.

B. Section 2410 Claims (Counts I-III)

Next, we review the district court's grant of summary judgment. Counts I-III of the complaint challenge the procedural validity of tax liens filed against the Huffs for deficiencies in the 1982 tax year. The Huffs allege that the government failed (I) to issue a notice of deficiency as required by 26 U.S.C. §§ 6212 and 6213(a), (II) to assess the Huffs in accordance with 26 U.S.C. § 6203, and (III) to issue a notice of assessment and demand for payment as required by 26 U.S.C. § 6303(a). The district court granted the IRS's motion for summary judgment on these counts, holding that counts I and II were barred because they challenged the merits of the assessment and thus could not be maintained under 28 U.S.C. § 2410. *See Elias v. Connett,* 908 F.2d 521, 527 (9th Cir. 1990). As for count III, the district court held that the IRS Forms 4340 introduced by the government raised the presumption that the IRS had made the requisite demands for payment and that the Huffs had failed to rebut the presump-

tion. We affirm the grant of summary judgment as to counts I and III, but reverse it as to count II.

On appeal, the government argues that the grant of summary judgment on all three counts is supported by the Huffs' failure to specify the precise "real or personal property on which the United States has or claims an interest" as required by § 2410(b). However, the Huffs have alleged that the IRS filed liens against their property located in Shasta County and that the IRS has levied on their wages several times. Viewing the record in the light most favorable to the Huffs, we find these allegations sufficient.[3] *See Hughes v. United States*, 953 F.2d 531, 538 (9th Cir. 1992) (indicating that a taxpayer can challenge the continued collection of taxes through garnishment of wages under § 2410). On the record before us, we simply cannot conclude that the IRS no longer claims a "challengeable" interest in the Huffs' wages or property subject to the lien.

The district court correctly concluded that it had jurisdiction to hear counts I-III only if those claims can be construed as quiet title actions under 28 U.S.C. § 2410.[4] This court has

[3]While the Huffs cannot seek relief for monies or property already in the hands of the IRS in a § 2410 quiet title action, *see Farr v. United States*, 990 F.2d 451, 453 (9th Cir. 1993), the IRS claims that Nancy Huff still owes $2,789.93 for the 1982 tax year. Moreover, the record does not indicate that the liens filed against the Huffs in Shasta County have been released or discharged. Accordingly, the Huffs can maintain this action to quiet title to any property subject to the liens and to prevent further levy on their wages. *See Hughes*, 953 F.2d at 538.

[4]If the claims are not quiet title actions under § 2410, then the government has not waived its sovereign immunity. The Huffs argue in the alternative that the government has waived its immunity to this suit under 5 U.S.C. § 702. We hold, however, that § 702's waiver does not extend to this case. *See Hughes*, 953 F.2d at 537-38. Section 702 does not permit parties to bring quiet title actions challenging the merits of an underlying tax assessment because such claims are impliedly barred by the limited waiver of § 2410. *See* 5 U.S.C. § 702 (1988); *see also Hughes*, 953 F.2d at 537.

indicated that § 2410 permits "quiet title actions challenging the procedural aspects of tax liens, but not the merits of the underlying tax assessments." *Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991). We must decide then whether the allegations in counts I, II, and III of the Huffs' complaint allege procedural lapses in tax liens or challenge the merits of the underlying assessment.

1. Count I

This court has held that claims that the IRS failed properly to notice deficiencies address the merits of an assessment and therefore are not actionable under § 2410. *See Elias*, 908 F.2d at 527. Thus, the United States has not waived its immunity to be sued on count I of the Huffs' complaint. Because the district court did not have jurisdiction over count I under § 2410, the court correctly granted summary judgment on that count. *See id.* at 527-28.

2. Counts II and III

[1] This court has held that claims regarding both the failure by the IRS properly to assess a tax and to provide a taxpayer with a copy of an assessment under § 6203, and the failure to send a notice of assessment and a demand for payment under § 6303(a) present procedural challenges to the validity of a lien and are therefore cognizable under § 2410. *See Arford*, 934 F.2d at 232; *Elias*, 908 F.2d at 527. Thus, the allegations of counts II and III will support an action under § 2410 unless the government can establish that there is no genuine issue of material fact as to whether the IRS complied with §§ 6203 & 6303(a).

a. Section 6203

The district court ruled erroneously that count II did not present a procedural challenge to a tax lien. However, count II alleges that the IRS failed properly to assess taxes against

the Huffs and that the IRS failed to respond to the Huffs' request for a copy of an assessment under § 6203. *See* 26 C.F.R. § 301.6203-1 (1992) (indicating that § 6203 requires the IRS to send the taxpayer "a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed" if the taxpayer makes a request for a copy of the assessment pursuant to § 6203).

[2] Generally, courts have held that IRS Form 4340 provides at least presumptive evidence that a tax has been validly assessed under § 6203. *See Farr*, 990 F.2d at 454; *Geiselman v. United States*, 961 F.2d 1, 5-6 (1st Cir.), *cert. denied*, 113 S. Ct. 261 (1992); *Rocovich v. United States*, 933 F.2d 991, 994 (Fed. Cir. 1991) ("Certificates of Assessments and Payments [are] routinely used to prove that a tax assessment has in fact been made."); *United States v. Chila*, 871 F.2d 1015, 1017-18 (11th Cir.), *cert. denied*, 493 U.S. 975 (1989); *United States v. Miller*, 318 F.2d 637, 638-39 (7th Cir. 1963). Here, however, the IRS seeks to rely solely on these forms to prove not only that an assessment had been validly made, but that the taxpayer had been provided with a copy of the assessment as per Treasury Regulation § 301.6203-1. We are unaware of any authority indicating that these forms standing alone constitute evidence for the latter proposition. Indeed, no entry on the form contains any information in this regard.

[3] Moreover, in *Farr* this court ruled that Forms 4340 are merely presumptive, not conclusive, evidence that the IRS has complied with § 6203. *Farr*, 990 F.2d at 454. The court ruled that the fact that the taxpayer claimed not to have received certain notices precluded the court from granting judgment against the taxpayer in that case. *Id.* Here, the Huffs similarly claim that they never received any Form 4340 in response to their request for a copy of their assessments. While the government may have proved that Forms 4340 existed for the Huffs for the 1982 tax year, the record is devoid of any indi-

cation that the Huffs were provided with copies of these forms in response to their request for a copy of their assessments.

[4] In addition, some of the Forms 4340 provided by the government to support the grant of summary judgment in this case appear defective. Courts have indicated that a Form 4340 is adequate to prove a valid assessment if it lists the "23C date," indicating the date on which the actual assessment was made.[6] *See Geiselman*, 961 F.2d at 5-6 (indicating that the government could prove a valid assessment by providing a Form 4340 instead of a Form 23C, the actual assessment forms, because the Form 4340 listed the 23C dates); *Brewer v. United States*, 764 F. Supp. 309, 315-16 (S.D.N.Y. 1991) (holding that an issue of fact exists regarding the method of assessment when the IRS relies on Forms 4340 that do not list 23C dates). Here, the 4340 Form for Maurice Huff's 1982 tax year did not list any 23C dates. Accordingly, we conclude that the IRS could not rely solely on those forms to prove that Mr. Huff's tax was validly assessed.

[5] Given the defect in the Forms 4340 and the fact that the record contains no evidence indicating that the Huffs received copies of their assessments pursuant to their request under § 6203, we conclude there are genuine issues of material fact as to whether the IRS has complied with the requirements of § 6203. *See Farr*, 990 F.2d at 454; *Geiselman*, 961 F.2d at 5-6; *Brewer*, 764 F.Supp. at 315-16. Accordingly, we reverse the district court's grant of summary judgment as to count II.

[6] "In practice, the IRS makes assessments by having an assessment officer fill out and sign a 'summary record of assessment,' also known as a Form 23C." *Geiselman*, 961 F.2d at 5. The 23C date on a Form 4340 indicates the date on which the Form 23C was signed, the date of the assessment, and provides evidence that the tax was actually assessed by completing the Form 23C. Without a 23C date, the Form 4340 gives no indication as to whether the tax was actually assessed.

b. Section 6303

The district court also concluded that the Forms 4340 established that the IRS complied with the requirements of § 6303(a). We agree, at least in principle. *See infra.* This court has held that the precise forms used by the IRS in this case are sufficient evidence to support a grant of summary judgment on a claim that the IRS failed to issue a notice of assessment and demand for payment under § 6303(a). *See Hughes,* 953 F.2d at 538-40. Here, the Huffs' forms indicate that the appropriate notices were sent by the IRS, and the Huffs present no evidence suggesting that the information in the forms was inaccurate.

We affirm on count III with a reservation. Section 6303(a) requires that notice under that section be given within 60 days of the date of assessment. While Mr. Huff's Form 4340 indicates that he received notice on December 12, 1986, we cannot determine whether this was within 60 days of the assessment date because the 4340 Form does not list the 23C date. Accordingly, we affirm the district court's grant of summary judgment on count III with respect to Mrs. Huff and vacate the summary judgment on count III with respect to Mr. Huff, but permit reinstatement if the district court finds that Mr. Huff was validly assessed within 60 days prior to December 12, 1986.

C. Refund Claim (Count IV)

The Huffs argue that the district court's grant of summary judgment on count IV was also erroneous. We disagree. The district court properly concluded that count IV was a claim for a tax refund pursuant to 28 U.S.C. § 1346(a). The court held that the Huffs failed to allege that they paid the full amount of the assessment as required by *Flora v. United States,* 362 U.S. 145 (1960). The Huffs argue that this requirement should not apply in this case because they were never informed what the amount of the assessment for 1982 was. We need not

resolve this issue because the record indicates that the Huffs failed to file a claim for a refund with the Secretary of the Treasury prior to filing suit in the district court as required by 26 U.S.C. §§ 6532(a)(1) and 7422(a). Accordingly, we affirm the district court's grant of summary judgment on count IV.

D. Disclosure of Return Information (Counts V-VII)

Counts V-VII of the Huffs' complaint allege that the IRS improperly disclosed return information in violation of 26 U.S.C. § 6103 in three notices of tax levy sent to the Huffs' employers between February and August, 1990. The district court granted the motion for summary judgment stating, "[t]he information was properly disclosed in connection with the IRS's collection activities."

To prevail on its motion for summary judgment, the IRS must establish either that the information contained in the notices of levy was not return information, *see Maisano v. United States*, 908 F.2d 408, 410 (9th Cir. 1990), or that the disclosures were authorized under 26 U.S.C. § 6103(k)(6) and Treasury Regulation § 301.6103(k)(6)-1(b)(6). The IRS does not argue that the information in the notices was not confidential return information. Thus, the IRS is entitled to summary judgment only if the disclosures were authorized as a matter of law.

The Huffs contend that defects in the IRS's collection procedures underlying the levy notices subject the IRS to liability for the disclosure of return information despite the provisions of 26 U.S.C. § 6103(k)(6). This court has held to the contrary. *See Farr*, 990 F.2d at 455. In *Farr*, the court considered this precise question before us. The court concluded that even though the collection procedures at issue may have been defective, Farr could not bring an action under § 7431(a)(1) based upon information disclosed to Farr's employer in a levy notice. *Id.* The court held that the levy notices fell "squarely within the exemption under § 6103(k)" despite the possible

procedural lapses involving the actual levy. *Id.* Accordingly, we affirm the district court's grant of summary judgment on counts V-VII.

AFFIRMED in part, REVERSED in part, and VACATED in part. Each party shall bear its own costs on appeal.

FILED
DEC 17 1991
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MAURICE R. HUFF and
NANCY R. HUFF,
Plaintiffs,

NO. CIV. S-91-859
WBS/PAN

v.

UNITED STATES OF AMERICA
Defendant.

MEMORANDUM AND ORDER

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The United State of America has moved for summary judgement pursuant to Fed. R. Civ. P. 56

Procedural Background

On June 28, 1991, plaintiffs filed this complaint to quiet title to personal property and for unlawful disclosure of information arising out of tax collection activities of the Internal Revenue Service. The complaint denominates seven "counts." The first three counts challenge the United States' issuance of a notice of tax lien for the period 1982 without allegedly issuing a notice of deficiency, failure to assess the tax, and failure to issue a notice of assessment and demand for payment. The fourth count alleges defendant had no right or authority to take any collection action against plaintiff for the period 1982. The fifth, sixth, and seventh counts allege the United States disclosed without authorization return information in various notices of levies. The complaint seeks to remove a notice of

federal tax lien, to recover taxes collected, and to obtain damages for unlawful disclosure of information.

The United States answered the complaint on August 27, 1991. Plaintiffs moved to strike to answer on September 19, 1991. On November 7, 1991, the Court denied the motion in part and granted it in part.

Discussion

A. Counts I-III

The United States argues plaintiff have failed to state a claim under 28 U.S.C. §2410 and therefore the United States has not waived its immunity to suit for Counts I-III. Section 2410 states, in pertinent part,

> The United States may be named a party in any civil action or suit ... to quiet title to ... real or personal property on which the United States has or claims a mortgage or other lien.

28 U.S.C. 2410; See also Bank of Hemet v. United States, 643 F.2d 661, 664 (9th Cir. 1981). However, a taxpayer may not use a §2410 action to collaterally attack the merits of an assessment. United States v. Polk, 822 F.2d 871, 872 n. 1 (9th Cir. 1987). Rather, to state a claim under §2410, a taxpayer's allegations must contest the procedural validity of the IRS lien. See Elias v. Connett, 908 F.2d 521, 527 (9th Cir. 1990).

In Elias, appellant contended that: "(1) his tax deficiency is null and void; (2) a lawful assessment against him does not exist; (3) he is not liable for any 26 U.S.C. §6672 penalties; and (4) his assessment is invalid because he was not issued a notice of deficiency for 1981 and 1982." Id. The court found that "[t]hese allegations address the merits of Elias's assessment rather than the procedural validity of the IRS's lien. Therefore, they do not support Elias's claim that he has stated a quiet title cause of action under section 2410(a) (citations omitted)." The court nevertheless went on to state that Elias' separate allegation that the IRS's lien is invalid because the IRS did not send him a valid notice of assessment and demand for payment

under 26 U.S.C. §6303(a) did attack the procedural validity of the lien. However, the court concluded that Elias did not state a claim because the United States had provided the appropriate notices. Id. at 528.[1]

Here, the United States has not waived its immunity to suit with respect to plaintiffs' first two claims because under Elias they challenge the merits of the assessment.[2] While plaintiffs' third claim attacks the procedural validity of the lien, it too fails. The Certificates of Assessment attached to the Government's motion for summary judgement indicate that notice was provided to Nancy Huff on October 6, 1986 (date of assessment) and January 12, 1987. They also indicate that a fourth delinquency notice was sent on December 1, 1986. The Certificates of Assessment for Maurice Huff's 1982 tax year indicates that a notice of balance due was sent December 15,

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[1] Plaintiffs are incorrect in asserting that the "Ninth Circuit has practically abandoned some of the conclusions" in Elias. Arford v. United States, 934 F.2d 229 (9th Cir 1991), is not to the contrary and the Third Circuit's decision in Robinson v. United States, 920 F.2d 1157 (3rd Cir. 1990), is of no import in light of the fact that there is Ninth Circuit precedent precisely on point.

[2] Although plaintiffs also allege the United States has waived immunity to suit under the Administrative Procedures Act, 5 U.S.C. §701 et seq., this contention is without merit. While the APA provides a general waiver of sovereign immunity, it does not confer jurisdiction on these facts. United States v. McCarthy, 929 F.2d 1085, 1088 (5th Cir. 1991); See also State of Washington v. Udall, 417 F.2d 1310 (9th Cir 1969) (the APA does not constitute a consent of the United States to all suits of whatever nature and a blanket waiver of sovereign immunity).

1986 (date of assessment). It also indicates that fourth delinquency notices were sent January 5, 1987 and July 1987.

The certificates of assessment are presumptive evidence that notice was entered in accordance with §6303(a). See United States v. Miller, 318 F.2d 637, 639 (7th Cir. 1963); United States v. Dixon, 672 F.Supp. 503 (M.D. 1987); United States v. Posener, 405 F.Supp. 934, 937 (D.Md. 1975). The Huffs fail to present any evidence that would refute the United States' evidence that notice was provided. In a motion for summary judgement, the nonmoving party may not rest on his pleadings, but must provide the district court with evidence of the existence of a disputed material issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).[3] The Huffs' declaration that

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[3] Plaintiffs' move to strike the Certificates of Assessment as inadmissible because they are improperly authenticated and that evidence is insufficient for failure to comply with the best evidence rule. The exhibits bear the signature of an officer of the Department of Treasury. An unsealed document purporting to bear the signature in the official capacity of an officer or employee of a United States agency is admissible without extrinsic evidence of authenticity if a public officer certifies under seal that the signature on the document is authentic and was made in the officer's official capacity. See Fed. R. Evid. 902(2); see McCarthy v. United States, 929 F.2d 1085 (5th Cir. 1991).

Moreover the United States need not produce the actual document under these circumstances. See United States v. Zolla, 724 F.2d 808, 810 (9th Cir.), cert denied, 469 U.S. 1067 (1984) (where IRS routinely destroyed copies of notices of deficiency and demands for payment, postal form for certifying that notices of deficiency had been mailed and IRS form certifying that taxes and penalties had been assessed were sufficient in absence of contrary evidence to establish that

they did not receive the notices does not interject a question of material fact because the defendant is not required to prove that plaintiffs received the notice, only that it was properly sent. McCarthy, 929 F.2d at 1089. The Certificates of Assessment constitute presumptive evidence that such notice was sent to the taxpayer. See United States v. Chila, 871 F.2d 1015, 1019 (11th Cir. 1989), cert denied, 493 U.S. 975 (1989).[4]

B. Count IV

In count four plaintiffs allege:

> The United States had no right or authority to take any "collection" against plaintiffs for the period 1982, nor does it have any right to keep the property (monies)

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notices and assessments were properly made); see also Lovelace v. United States, 91-1 U.S.T.C. P. 50,144 (W.D. Wash. 1990) (rejecting argument that government agent lacked authority to authenticate 4340 forms and that the government needed to produce actual documents). For these reasons, plaintiffs' motion to strike is denied.

[4] The decision in United States v. Wright, 658 F.Supp. 1 (D. Alaska 1986) is not on point. In that case the Internal Revenue Service brought an action to reduce to judgement an assessment of federal income taxes. The issue arose in that case whether the United States mailed the notice of deficiency in full compliance with 26 U.S.C. §6212(a) ("Secretary . . . authorized to send notice of deficiency to the taxpayer by certified mail or registered mail."). The court, after weighing the evidence concluded it had not been so mailed. Id. at 2. The court in Wright did not decide the issue of whether a presumption arises from a Certificate of Assessment that notice of assessment and demand for payment had been sent pursuant to 26 U.S.C. §6303(a) (Secretary shall, . . . give notice to each person liable for the unpaid tax.").

which it has already obtained, directly or indirectly, from the plaintiffs.

It appears to the court that in count IV plaintiffs have attempted to state a claim for tax refund. Pursuant to 28 U.S.C. §1346(a) the district courts have original jurisdiction of "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." 28 U.S.C. §1346(a). The Supreme Court has held that §1346(a) requires a taxpayer to make full payment of an assessment before an income tax refund suit can be maintained in a federal district court. See Flora v. United States, 362 U.S. 145 (1960); 26 U.S.C. §7422(a). Further, a tax refund suit will fail as a refund action if it does not allege that the full amount of the assessed tax liabilities for the years in question have been paid. See Gattuso v. Pecorellam, 733 F.2d 709, 710 (9th Cir. 1984). Plaintiffs do not allege or offer evidence that they have paid the full amount of the assessed tax liabilities for the years in question, and therefore the United States is entitled to summary judgement on that issue.[5]

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[5] Plaintiffs effort to convert the fourth claim for relief into either a claim of conversion or violation of due process is unavailing. The federal district courts lack jurisdiction over tort claims "arising in respect of the assessment or collection of any tax." 28 U.S.C. §2860(c); see also Morris v. United States, 521 F.2d 872, 874 (9th Cir. 1975). Moreover, so long as there is adequate opportunity for post-seizure determination of rights tax collection procedures of the Internal Revenue Code meet due process requirements. Myers v. United States, 647 F.2d 591, 602 (5th Cir. 1981).

C. Counts V-VII

Counts V-VII allege that the United States violated the disclosure provisions of 26 U.S.C. §6103 by disclosing return information in four notices of levy served upon the plaintiffs' employers. The information was properly disclosed in connection with the I.R.S.'s collection activities. See Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990); Treas. Reg. §301.6103(k)(6)-1(b)(6) (authorizing disclosure of tax return information "to apply the provisions of the Code relating to the establishment of liens against [the taxpayer's] assets, or [a] levy on . . . the assets to satisfy any [outstanding] liability."). The United States is therefore entitled to summary adjudication on counts V-VIII.

IT IS THEREFORE ORDERED that defendant's motion for summary judgement be, and the same is, hereby granted in favor of defendant and against the plaintiffs.

IT IS FURTHER ORDERED that plaintiff's motion to strike the declaration of John Pirkle and the Certificates of Assessment be, and the same is, hereby denied.

DATED: December 17, 1991

/s/_____

WILLIAM B. SHUB

UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 06 1994
CATHY A. CATTERSON
U.S. COURT OF APPEALS

MAURICE R. HUFF, NANCY HUFF, Plaintiffs-Appellants,	)	No. 92-15089
vs.	)	D.C. No. CV-91-00859-WBS
UNITED STATES OF AMERICA, Defendant-Appellee.	)	ORDER

Before: FAIRCHILD,* BEEZER, WIGGINS, Circuit Judges

Appellants' petition for rehearing is DENIED.

* Honorable Thomas E. Fairchild, Senior Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

Supreme Court, U.S.
FILED
MAY 26 1994
OFFICE OF THE CLERK

No. 93-1560

In the Supreme Court of the United States

OCTOBER TERM, 1993

MAURICE R. HUFF AND NANCY R. HUFF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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3 pp

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1560

MAURICE R. HUFF AND NANCY R. HUFF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on November 26, 1993 (Pet. App. 16). An untimely petition for rehearing was filed 17 days later, on December 13, 1993.* The petition for rehearing was denied on January 6, 1994, without any indication that the court of appeals had considered it on its merits (Pet. App. 37). The petition for a writ of certiorari was filed on April 4, 1994, more than 90 days after November 26, 1993.

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* Rule 40 of the Federal Rules of Appellate Procedure requires that a petition for rehearing be filed within 14 days of the entry of the order of the court of appeals. No order or local rule enlarged the time for filing the petition for rehearing in this case. See also F.R.A.P. 25(a).

"Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MAY 1994

(3)

Supreme Court, U.S.
FILED
JUN 13 1994
OFFICE OF THE CLERK

No. 93-1560

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MAURICE R. HUFF
NANCY R. HUFF,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEAL

REPLY TO OPPOSITION

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2 pp

Instead of responding on the merits of Huffs' petition, respondent merely asserts that it was filed out of time because of an alleged untimely petition for rehearing in the appellate court, and because there is no "indication that the court of appeals had considered it on its merits." (Opp. 1). Petitioners contend there is simply no merit to the respondent's argument.

First of all, as this Court is probably well aware, rehearing petitions in appellate courts are routinely denied without any indication of consideration on their merits, and usually without any comment whatsoever. Therefore, respondent's apparent inference that rehearing denials must show consideration of the merits is wholly groundless.

Next, the appellate court itself did not consider the rehearing petition untimely since it was not denied on that ground (Pet. App. 37). If in fact it was untimely (and respondent has presented no record to show it was), the appellate court itself would be the court to make such a determination. Again, as this Court is probably well aware, if a petition for rehearing is denied due to untimeliness, the appellate court will state so.

Finally, Rule 26(c) of the Federal Rules of Appellate Procedure (FRAP) provides that when a party is required to act within a prescribed time after a paper is served by mail, 3 days shall be added to that period. FRAP Rule 36 requires the clerk of the appellate court to mail a copy of the opinion to all parties. Therefore, an additional 3 days are added to the 14 day requirement set forth in Rule 40. Consequently, even if respondent's statement was true, the rehearing petition was not untimely.

CONCLUSION

This petition for certiorari is timely, and should not be denied on any issue of timeliness.

Respectfully submitted,

Maurice R. Huff
Nancy R. Huff